Supreme Court, U. S.
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NO. 79-1880

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

LAKE LAWRENCE, INC.,
Appellant,

v.

THURSTON COUNTY, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
There Are Substantial Federal Questions For This Court to Decide and the Court Has Jurisdiction as a Matter of Right and Discretion Under 28 U.S.C. § 1257(2) and (3)	1
The Judgment Below Was Not Based On an Adequate Non-Federal Basis as a Matter of Fact and Law	8
Conclusion	20
Appendix	A-1

TABLES OF AUTHORITY

Table of Cases

Agins v. City of Tiburon, ___ U.S. ___, 65 L. Ed. 2d 106, 100 S. Ct. ___ (1980)	1
Berman v. Parker, 348 U.S. 26 (1954)	15
Bishop v. Town of Houghton, 69 Wn.2d 786, 420 P.2d 368 (1966)	2-3
Cramp v Bd. of Public Instruction, 368 U.S. 278 (1961)	16
Creswill v. Grand Lodge Knights of Pythias of Georgia, 225 U.S. 246 (1911)	10
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	5,9
Davis v. Wechsler, 263 U.S. 22 (1923)	10

Page

Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 572 P.2d 1121 (1974) 14

Dept. of Highways v. Environmental Council, 82 Wn.2d 551, 572 P.2d 1121 (1974) 14

First National Bank v. Anderson, 269 U.S. 341 (1926) 9

Fiske v. Kansas, 274 U.S. 380 (1926) 9,10

Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976). 12

Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958). 2

Kaiser Aetna v. United States, U.S. ___, 100 S. Ct. 383 (1979) . . 6,11

Merkel v. Port of Brownsville, 8 Wn. App. 844, 509 P.2d 390 (1973) . . . 14

National Assoc. for the Advancement of Colored People v. Federal Power Commission, 425 U.S. 647 (1976) . . . 15

Ogden v. City of Bellevue, 45 Wn.2d 492, 275 P.2d 899 (1954). 2

Parkridge v. Seattle, 89 Wn.2d 454, 573 P.2d 359 (1978) 3

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). 1

Raley v. Ohio, 360 U.S. 423 (1958). . . 16

Page

Sharinghouse v. Bellingham, 4 Wn. App. 198, 480 P.2d 233 (1971) . . . 3,18

Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977) 14

State ex rel. Kuphal v. Bremerton, 59 Wn.2d 825, 371 P.2d 37 (1962). . 18

State ex rel. Welch v. Seattle School Dist. No. 1, 45 Wn.2d 6, 272 P.2d 617 (1954) 12

Staub v. City of Baxley, 355 U.S. 313 (1957). 9

Sterling v. Constantin, 287 U.S. 378 (1932). 6

United States v. Lee, 106 U.S. 196 (1882). 3,6

Constitutional Provisions

U.S. Const. Amend. V. 2,4,5

U.S. Const. Amend. XIV 2,4,5,15

Wash. Const. art. 1, sec. 16 4-5

Statutes

RCW Ch. 34.04 (Administrative Procedure Act). 8,16

RCW Ch. 43.21C (SEPA: State Environmental Policy Act) . . . 1,4,7,8, 12,13,et seq.

RCW Ch. 58.17 (Platting Statute). 1,4,12,14,15

Page

RCW Ch. 90.58 (SMA: Shorelines Management Act) 1,2,7,8,14

Thurston County Ordinances

Comprehensive Plan 13,17

Shorelines Master Program . . . 2,3,7,11, 12, *et seq*.

Textbooks

Hill, *The Inadequate State Ground*, 65 Col. L. Rev. 943 (1965) 10

THERE ARE SUBSTANTIAL FEDERAL QUESTIONS FOR THIS COURT TO DECIDE AND THE COURT HAS JURISDICTION AS A MATTER OF RIGHT AND DISCRETION UNDER 28 U.S.C. § 1257(2) and (3)

Substantial federal questions of importance were presented, expressly passed upon, or necessarily decided by the judgment of the court below. They remain the same and are now presented in the Jurisdictional Statement. The appellees' motion is actively misleading to camouflage their importance by implying that the property rights and freedom of the appellant were merely regulated by the operation of valid, constitutional statutory regulations[1], of SEPA, the platting statute, and SMA[2], in that the actions of appellees merely constituted an adjudication of facts in carrying out that linked "validity"

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[1] Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, ___ U.S. ___, 65 L. Ed. 2d 106, 100 S. Ct. ___ (1980).

[2] SEPA: State Environmental Policy Act, Chapter 43.21C, J.S., App., A-266; Platting Statute, Chapter 58.17, J.S. App., 58.17; SMA: Shorelines Management Act, Chapter 90.58, J.S. App. A-280.

and therefore the questions presented are disputes of fact not of importance for this Court to decide (Motion 8-13).

In summary, a decision to one group of those questions, Qs. 1-2, is dependent upon a decision to the other group, Qs. 3-8. The first summarized question that arises is whether the Fifth and Fourteenth Amendments guarantee the exercise of the fundamental rights of a person established by common law and statutes having validity by equally, area-wide, applying written, informative standards limiting those rights that have been held to statutorily vest and cannot be retrospectively changed, even by legislation, after an application has been made in compliance with their regulations[3], i.e. SMA and its Master Program

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[3]Ogden v. City of Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899 (1954); Hull v. Hunt, 53 Wn.2d 125, 127-131, 331 P.2d 856 (1958); Bishop v. Town of Houghton, 69 Wn.2d 786,

regulations, and leave it up to the freedom, liberty and discretion of a person to make a choice as to both how to choose to use and use, enjoy, dispose of and make a profit from private property for residential purposes, so long as the choice and use is made and limited within the bounds of written, informative standards, specifications and guidelines set forth in regulatory statutes having validity because of the information of the standards they contained and their area-wide application to property, without having singled out one piece of property only, which have been held to establish rights of a person as to how to choose to use and use private

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footnote cont.

795, 420 P.2d 368 (1966); State ex rel. Kuphal v. Bremerton, 59 Wn.2d 825, 828, 371 P.2d 37 (1962); Sharinghouse v. Bellingham, 4 Wn. App. 198, 203, 480 P.2d 233 (1971); Parkridge v. Seattle, 89 Wn.2d 454, 460-461, 462-467, 573 P.2d 359 (1978). Compare: United States v. Lee, 106 U.S. 196 (1882).

property that are in compliance with their written, informative standards[4].

The appellant challenged that the appellees exercised such powers of government to deprive and take away such liberty of choice and property rights of appellant in excess and beyond the scope of SEPA and the platting statutes' expressed or implied delegated authority; that the excessive exercise of such state police power by administrative adjudication deprived the appellant of its freedom, liberty and rights as to how to choose to use and use its private property, and that such actions resulted in its private property rights being taken for public use without just compensation as protected by the due process and equal protection clauses and prohibited by the Fifth and Fourteenth Amendment and Article I, Section 16 of the

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[4]Supra, footnotes 1 and 3.

Washington Constitution. Or, in the alternative, if the statutes, as applied, delegated to the appellees such authority such statutes were invalid for the same reason[5]. The judgment ruled against the challenges made as to the first alternative and the second alternative (J.S. 2-8).

The second question that arises is if the person has those rights, can the person's rights to just and fair judicial procedural and substantive due process and equal treatment of the law in obtaining judicial remedies against the local government and its public officials, who exercised those state police powers under color of state law, claimed to be in violation of its Fifth and Fourteenth Amendment rights, inter alia, be likewise checkmated, circumvented and thwarted by that same local government and its public officials for a

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[5] Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-289 (1921).

second time claiming while adversary parties to actions commenced against them for the same violations that they have police powers unbounded by any statutory procedural or substantive standards or guidelines to authorize them to procedurally proceed out of court and by fiat make substantive findings and conclusions of law out of court and file them in court as judicial proof of their authority and substantively dispositive of the judicial constitutional claims against them, as the judgment has authorized the appellees to do so and continue to do in the future on any application by the appellant to be made to use its private property[6]?

This second summarized federal question appears in Questions 1 and 2 of the

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[6] See J.S. Judgment, App. A-199; United States v. Lee, 106 U.S. 196 (1882); Sterling v. Constantin, 287 U.S. 378, 396-398 (1932); Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979).

Jurisdictional Statement and was passed upon and necessarily decided when the court held:

> "[T]he Commissioners are not bound by the findings of the Shorelines Hearings Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal and, had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagle." (Emphasis added; J.S. Judg., App., A-197.)

The order accepting appellate jurisdiction and staying the pending trial likewise passed upon the procedural and substantive authority of the appellees to do so, and the court below to have jurisdiction, when the appellees chose not to appeal the Board's decision to the trial court and yet circumvented the SEPA procedural and substantive safeguards;[7] the mandates of SMA and the Master Program

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[7] SEPA, procedure: 43.21C.030(2)(a)-(e); substantive: 43.21C.060, J.S. App., A-266-269.

regulations[8] and "contested" the Board's SMA and SEPA findings out of court and presented their findings and conclusions in trial court and the court below as proof of their authority in face of the prohibition of the Administrative Procedure Act[9].

THE JUDGMENT BELOW WAS NOT BASED ON AN ADEQUATE NON-FEDERAL BASIS AS A MATTER OF FACT AND LAW

The jurisdiction of the Court in this case is not based upon the invalidity of language appearing on the face of

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[8]SMA, "A permit shall be granted . . .", 90.58.140, (2)(b), J.S. App., A-288-289; Shorelines Hearing Board, 90.58.170-180, J.J. App. A2950-198; changing of Master Program regulations, 90.58.190, J.S. App., A-299; lands adjacent to shoreline lands, 90.58.340, J.S. App., A-300.

[9]See J.S., Administrative Procedure Act, RCW 34.04.130 Contested cases-Judicial Review, (1), (3); Appellant's Motion and Memo for Discretionary Review, J.S., App. A-153, 173; Supreme Court Order Accepting Certification, J.S., App. A-183; Appellant's Motion For Reconsideration, J.S. App. A-202; Supreme Court Order Denying Motions for Reconsideration, J.S. App. A-245.

statutes, but the absence of language and the interpretation and application of language of statutes, the validity of which was upheld by the judgment[10]. The Jurisdictional Statement need not to have pointed in questions raised to statutory language on its face that was not invalid[11]. Nor does the statement call upon the Court to resolve disputes of facts; except to examine the record that the appellees' actions were not the exercise of administrative adjudication in the application of valid, area-wide, land-use regulations that the motion claims, and there is no evidence in the record to support facts found by the court below to

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[10] Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921); First Nat. Bank v. Anderson, 269 U.S. 341, 345-347 (1926); Motion, para. 4, pg. 9.

[11] Ibid, Fiske v. Kansas, 274 U.S. 380, 385 (1926); Staub v. City of Baxley, 355 U.S. 313, 319-320 (1957); Motion, para. 4, pg. 9

support its conclusions of law as to state and federal questions interdependent upon those facts found by the court.[12] "Springes" may not be set, "for those who are endeavoring to assert rights that the State confers", and the assertion of federal rights are not to be defeated by procedural or substantive "springes" of state law, when "plainly and reasonably made"[13]. The motion sets "springes" when camouflaging the appellees' actions to be the authorized application of "valid" statutory regulations authorized by the trial court return of the record; the Shorelines Hearings Board decision; and the stipulation, when there is no evidence in

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[12] Fiske v. Kansas, 274 U.S. 380, 385-386 (1926); Creswill v. Grand Lodge Knights of Pythias of Georgia, 225 U.S. 246, 261 (1911); Motion, para. 2, pg.11.

[13] Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); Hill, The Inadequate State Ground, 65 CLR 943 (1965).

the record to support those conclusions[14].

The only source of statutory procedural and substantive authority used by the appellees when making their first and second decision on environmental grounds only to not approve the appellant's first choice of a plat subdivision of 27 residential lots, authorized by the standards of the Master Program regulations, and succeeding submissions of the appellant to demands made by the County reducing the number of lots to 24 and finally to 22 lots; not issue a shorelines permit for such subdivision, and not permit a private community pier to be constructed for private family residential use of the land and the use of the riparian rights[15], was the use of isolated language of the

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[14]Motion, pp. 3-8, 11-12.

[15]J.S., 20-24; Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979).

platting statute and SEPA[16], not implemented by any valid area-wide statutory regulations, such as the Master Program standards for subdivision and use of the land upon which the appellant relied.

The appellees and the judgment justified the jurisdiction and authority of the appellees and the jurisdiction of the court below[17] on inadequate state grounds to authorize the appellees while adversary parties making a second environmental

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[16] RCW 58.17.110, J.S., App. A-277: "The . . . county legislative body shall inquire into the public use and interest proposed to be served. . . .", by the platting. J.S., Judg., App. A-193-194; 196-198. RCW 43.21C.030, J.S., App. A-266: "The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this act. . . ." J.S., Judg., App. A-197-198.

[17] State ex rel. Welch v. Seattle Schl. Dist. No. 1, 45 Wn.2d 6, 272 P.2d 617 (1954); Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976) at 286 and 287; Dept. of Highways v. Environmental Council, 82 Wn.2d 280, 510 P.2d 216 (1973) at 282-287.

decison out of court when not appealing to the trial court the Shorelines Hearings Board decision and to act as advocates, judge and jury of their own authority, when circumventing the expressed procedural and substantive safeguards of statutory laws.[18]

The judgment after first concluding that the Comprehensive Plan "governs here", against the objection that its application would amount to discriminatory "spot zoning": J.S., Judg.,.App. A-189, based on the isolated, broad, extensive language of SEPA and the platting statute held that the Commissioners have:

> "[I]ndependent authority under SEPA . . . and that the denial of the plat in this case does not violate respondents' rights to due process or constitute a taking of private property for public use without compensation." (J.S., Judg., App. A-192-193; empha. added)

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[18] Supra footnotes, 7-9.

The conclusion of the independency of the procedural, substantive, adjudicatory authority of the Commissioners to make a second decision was based upon inadequate state grounds when narrowing the substantive, adjudicatory authority of the Board under SMA and SEPA to the shorelines area only of the site[19] and holding the Commissioners had greater independent, procedural and substantive authority than the Board when applying the broad, vague, uncertain, ambiguous and isolated language of the platting statute.[20]

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[19] Merkel v. Port of Brownsville, 8 Wn. App. 844, 850-51, 509 P.2d 390 1973; Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 556, 572 P.2d 1121 (1974); Sisley v. San Juan County, 89 Wn.2d 78, 83, 569 P.2d 712 (1977). Cf., results of judgment with cases cited in footnote 3, as to inconsistency. The Master Program definition of "residential development" (J.S., App. A-362) includes the non-physical "legal division of real estate"; supra footnote, 7, 8 and 9.

[20] Compare: The trial court's conclusions: 3.4 Public Interest and 3.5 Legislative

Then in answer to the challenge that the isolated language of the platting statute was over-broad, ambiguous, vague, and misleading and would be a violation of the due process and equal protection of law guarantees of the Fourteenth Amendment when applied to implement through administrative adjudication its language and not valid statutory regulations, the judgment inconsistently shifted, dodged, evaded, and without any adequate or tenable state authority arbitrarily concluded that the Commissioners' authority to deny the plat "derives essentially from SEPA" and that since SEPA is not a:

Footnote Continued
Intent re Platting. The trial court's decision on 'vagueness' is in accord with this Court's decision limiting the scope of the term 'public interest' in National Association for the Advancement of Colored People v. Federal Power Commission, 425 U.S. 647, 669-670 (1976). Note also the platting statute used the term "public use" that the judgment applied. Cf., Berman v. Parker, 348 U.S. 26 (1954).

> "[R]egulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standards, the vagueness doctrine as such is not applicable. See Blondheim v. State, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975)." (J.S. Judg., App. A-197.)

The reasoning is completely contrary to a similar evasion of the same challenge made to a non-regulatory vague Florida statute that this Court held invalid[21]. In this case such application is more of an unfair trap caused by the conflicts from "voice of the state" that arise when the appellant relied on SMA; the valid Master Program regulations; the procedural and substantive safeguards of SEPA; the Administrative Procedure Act, and the prior decisions of the court below with which the judgment is inconsistent[22].

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[21] Cramp v. Bd. of Public Instruction, 368 U.S. 278, 280, 287-288 (1961).

[22] Raley v. Ohio, 360 U.S. 423, 438-439 (1958); supra, footnote 3, 7, 8 and 9.

The non-SEPA environmental criteria that the appellees used and the judgment justified for the Commissioners to determine that a "cluster configuration" was favored as a non-SEPA "alternative"[23], over the choice of the appellant's subdivisions and that the status of eagles was "endangered", so as to determine to deny the plat and issuance of a shorelines permit on environmental grounds of their own making, was by borrowing that language from the Comprehensive Plan, a plan that on its face states its purposes as being a "blueprint" for legislation only and not adjudication in that it had not been implemented by any valid area-wide regulations and therefore created no statutory rights, benefits or detriments; except upon

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[23]Trial Court's findings, 2.7 Alternative Conditions, J.S. App. A-121; A-116: "the court believes that the actions of the respondents will destroy the property for all practical human uses" (Memorandum Opinion).

the appellant by political adjudication only in this case.[24] The judgment upheld the validity of the plan's application as not being an act of "spot zoning" in the face of the "Rural Environment" statutory zoning designation of the property (Judg., J.S. App. A-189), and also held that the actions of the Commissioners' use of the plan's language would not result in inverse condemnation in that subject to the will of the Commissioners there is a "possibility" that they may approve a plat with a "cluster configuration" with less lots to protect the status of the eagles as "endangered" under the plan (J.S., Judg., App. A-199). The finding of such "possibility"

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[24] Second Decision, J.S. App. A-76-79; Plan, J.S. App. Forward, A-381; Wildlife, A-396; State ex rel Krupehral v. Bremerton, 59 Wn.2d 825, 371 P.2d 37 (1962); Sharinghouse v. Bellingham, 4 Wn. App. 198, 480 P.2d 233 (1971).

has no evidence in the record[25] to support it and support the judgment's conclusion, based on that vague "possibility", that the appellant had a "balance test":

> "[P]resent, possible, and reasonably profitable alternative use to which" its property is "adaptable".[26]

The appellant's opportunity to a hearing on that fact was cut off by the appeal and judgment. The "possibility" is more remote when the second decision was based upon the appellees' lack of environmental knowledge of the impact to eagles by human use of the property, a SEPA duty that the appellees didn't fulfill[27].

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[25]First Decision, J.S. App. A-30; Second Decision, J.S. App. A-69; Appellant's Pet. and Affidavit for Review and Prohibition, J.S. App. A-32; Motion for Prohibition-S. Ct., J.S. App. A-232.

[26]Supra, footnote 21, J.S. Judg., App. A-199-120

[27]Supra footnote 7, 43.21C.030(2)(a)-(e); 43.21C.060, A-266-269; Second Decision, J.S. App. 77-79, supra, footnote 23.

CONCLUSION

The broad, vague language of SEPA and the platting statutes applied by the appellees had not been implemented by informative, valid, environmental, statutory regulations equally applicable to the benefit and detriment of the private use of property on the lake, as the valid Master Program regulations did upon which the appellant relied. The appellees used vague language only as authority to act under the guise of administrative adjudication to create the procedural and substantive means they employed to implement by adjudication de facto, special, legislation, and change the property rights of the appellant. The judgment and jurisdiction of the court below is without an adequate, non-federal basis and is in conflict with opinions of the court on federal questions (see Appendix).

Respectfully submitted
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Counsel for Appellant

APPENDIX

FEDERAL QUESTIONS IN CONFLICT WITH OPINIONS OF THE COURT

1. May common law and statutory rights to use private property, held to have vested[1] after an application is made to local government for permission to use private property, be made misleadingly to a person of common intelligence,[2] and be retrospectively[3] changed and "taken" away by the application by government of broad, misleading, statutory language[4] for a public use or purpose[5] "without the constitutional way of paying for the change"[6] to effect under the guise of

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[1] Footnote 3 of text.

[2] Raley v. Ohio, 360 U.S. 423 (1958).

[3] United States v. Lee, 106 U.S. 196 (1882).

[4] Cramp v. Bd. of Public Instruction, 368 U.S. 278, 287-288 (1961); National Assoc. For Adv. of Colored People v. Federal Power Com., 425 U.S. 647 (1976).

[5] Berman v. Parker, 348 U.S. 26 (1954).

[6] Penna. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

administrative adjudication a change of those rights to implement a plan, a "blueprint" for future legislation,[7] without valid legislation,[8] a separate power of government?[9]

2. May public officials by such application of statutory powers, unfairly, unequally,[10] on an ad hoc, piecemeal, discriminatory basis, arbitrarily[11] pick, choose, and select as they may determine only the appellant's liberty and rights to be burdened as a condition to their conferring governmental permission to use private

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[7] Footnote 22 of text.

[8] Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383, 390 (1979; Penn Central Transp. Co. v. City of New York, 439 U.S. 883 (1978); Agins v. Tiburon, ___ U.S. ___ 65 L. Ed. 2d 106 (1980).

[9] Mugler v. Kansas, 123 U.S. 623, 662 (1887).

[10] Ibid, 8.

[11] Supra, footnote 3; People v. Tibbits, 305 N.E. 2d 152, 155 (1973).

property by withholding that permission enforceable by criminal sanctions if used without it?[12]

3. Can public officials demand by force of criminal sanction that the use of private property be set aside within a selected piece to preserve areas of the natural environment as they may choose free from all human activity, otherwise authorized by valid area-wide standards of environmental statutory regulations for the protection of that same environment, the Shorelines Master Program comprehensive regulations, upon which the person misleadingly relied[13] and when that burden is imposed on no other use of private property in the area, the county, or in the state where it is located, so as not to have an

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[12] Platting Statute, 58.17.300, Violations-Penalties, J.S. App. A-280.

[13] J.S. 14-42.

"average reciprocity of advantage"[14] to the appellant when changing those rights expressed by valid regulations, promulgated by administrative adjudication only when the appellees usurped that function so legislatively expressed of the will of the people?[15]

4. Is a hearing and substantive decision out of court by a party's adversaries determinative of those questions as having such naked powers justifying the appellees' actions in making a second decision and determinative by the judgment reversing the trial court's mandamus order

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[14] Supra, footnote 6, 260 U.S. 383, 415; footnote 8.

[15] Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675; Mr. Justice Powell dissenting, 680; Mr. Justice Stevens with Mr. Justice Brennan, 680-689, citing Fasano v. Board of County Comm'rs, 264 Ore. 574, 580-581, 507 P.2d 23, 26 (1973) and Fleming v. City of Tacoma, 81 Wn.2d 292, 298-199, 502 P.2d 327, 331 (1972).

and pending trial for constitutional damages and compensation equivalent to a fair and impartial trial in court in final determination of those questions?[16]

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[16] Sterling v. Constantin, 287 U.S. 378 (1932); United States v. Lee, 106 U.S. 196 (1882).